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04-CV-090

Request to Testify  
2/11 DC

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January 18, 2005

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington D.C. 20544

**Re: Request to Testify February 11, 2005 Before the  
Advisory Committee on Civil Rules on the Proposed  
Changes Regarding Electronic Discovery**

Dear Mr. McCabe:

I respectfully request the opportunity to testify before the  
Advisory Committee on Civil Rules on February 11, 2005, in  
Washington D.C., on the proposed changes regarding electronic  
discovery.

The "Digital Evidence Project," which I serve as Chair, is an  
interdisciplinary working group of the ABA Section of Science and  
Technology Law, and its Information Security Committee. The Project  
engages in several activities including publishing; presenting CLE  
programs at ABA and other events such as the annual RSA Security  
Conference; hosting meetings; and now, conducting surveys on  
emerging trends. All this activity relates to the changing nature of our  
information infrastructure, particularly how complexity in electronically  
stored information is affecting the practice of law.

### The Digital Evidence Project Survey

The inaugural survey ("Survey") conducted by the Digital  
Evidence Project relates to the instant proposed amendments to the Civil  
Rules. The Survey, a paper form of which is attached, together with a  
cover letter from Ivan Fong, Chair of the Section, is being conducted by  
a nationally recognized market research firm, Target Research Group.  
The Survey has a substantial budget. From the outset, our group wanted  
the Survey to be distinguished by its *scientific* methodology.  
Accordingly, we have involved an expert in survey techniques who has  
written extensively on surveys in light of the *Daubert* decision –  
Professor Gary T. Ford of American University. Our group has

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conducted focused interviews of experts in the field, and Professor Ford has used that data to create what we view as a properly conceived survey.

Our target standard for the Survey is that its results would be deemed admissible in U.S. District Court under the *Daubert* line of cases. Accordingly, we propose that if our group is invited to testify, Professor Ford be present to address the Committee, as he can explain the survey methodology. Members of the Digital Evidence Project who can be present at the hearing include not only Professor Ford, but also Mike Prounis and Mike Faraci, who are Subcommittee Co-Chairs for the Survey, and who have electronic discovery experience going back to 1987. We can obviously keep testimony to the time allotted.

Finally, as you know, individual ABA Sections cannot speak on behalf of the ABA without prior approval of the entire House of Delegates, or unless other "blanket" authority is obtained. Accordingly, this testimony does not purport to represent ABA policy. Indeed, our comment does not take the form of an opinion, but rather an attempt to scientifically poll the legal community about the issues and policies underlying the proposed Rules.

We appreciate your consideration.

Sincerely,

George L. Paul  
Digital Evidence Project

GLP/edl  
Attachments

04252 Digital Evidence Survey  
January 14, 2005

To: (Respondent's name or email)  
From: ABA Section on Science and Technology Law  
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

The proposed amendments could have a significant impact on the discovery of electronically stored information and could thus have a direct effect on your organization. The survey gathers information about your current practices for electronically stored information and your views regarding the proposed amendments.

Target Research Group (TRG), a national survey research firm, has been commissioned to conduct the survey and to compile the results. All respondents are guaranteed anonymity, and your responses will be used only in the aggregate.

Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

If you have any questions about the survey, please contact:

1. George Paul, Chair, Digital Evidence Project, gpaul@lrlaw.com, 602-262-5326;
2. Mike Prounis, Digital Evidence Project, michael.prounis@evidenceexchange.com, 212-594-2501; or
3. Mike Faraci, Digital Evidence Project, mfaraci@NavigantConsulting.com, 202-973-2431

This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery

of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong  
Chair, 2004-05  
ABA Section of Science & Technology Law

## Digital Evidence Questionnaire

### Section I - Screening questions

The purpose of these questions is to determine your organization's experience with discovery of electronically stored information.

1. Has your organization been either a defendant or plaintiff in at least one lawsuit that was filed after January 1, 2000?

- Yes → continue
- No → Go to Section V
- Don't know → Go to section V

### Definition

For purposes of this survey:

**Electronic discovery** refers to the discovery of electronically stored information (ESI) including email, word processing documents, spreadsheets, voice mail, and virtually anything that is stored in electronic form on networks, servers, personal computers, floppy discs, hard drives, back-up tapes and other devices.

**ESI** is used as an acronym for "electronically stored information"

### Organization as Plaintiff:

2a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as plaintiff, discovery occurred:

- 0 → go to Q. 3a
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: \_\_\_\_\_
- Don't know ☐

2b. How many of those lawsuits in which your organization was a plaintiff included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: \_\_\_\_\_
- Don't know ☐

**Organization as defendant:**

3a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as defendant, discovery occurred:

0 → go to box before Q4

1-3

4-6

7-10

If more than 10, enter approximate number: \_\_\_\_\_

Don't know ☐

3b. How many of those lawsuits in which your organization was a defendant included electronic discovery?

0

1-3

4-6

7-10

If more than 10, enter approximate number: \_\_\_\_\_

Don't know ☐

If "0" to 2a and "0" to 3a go to Section V  
If "0" to 2a and "0" to 3b go to Section V  
If "0" to 2b and "0" to 3a go to Section V  
If "0" to 2b and "0" to 3b go to Section V  
If DK to 2a and 2b and 3a and 3b terminate

**Section II – Experience with electronic discovery in most recent case**

The next series of questions should be answered regarding the most recent experience your organization has had in which electronic discovery occurred.

**Definitions of terms used in this section**

**"Metadata"** is information about a particular data set which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Usually, metadata is not visible on the screen but is automatically appended to the file.

**"Legacy data"** is information is that the organization has stored on software or hardware that has been rendered obsolete or outmoded.

4. Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed?

Plaintiff  
Defendant  
Both defendant and counter claimant  
Other (please explain)

5a. Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?

Yes → continue  
No → go to Q6  
Don't know → go to Q6

5b. What was the final result of the pre-discovery meeting(s) regarding electronic discovery?

The parties agreed on the issues regarding electronic discovery without assistance of Court	→ Continue
The parties agreed on the issues regarding electronic discovery with assistance of Court	→ Continue
The parties did not agree on the issues regarding electronic discovery and the Court mandated the terms for electronic discovery.	→ Continue
Other (please explain)	→ Continue
Don't know	→ Continue

**Form of production:**

6a. Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court  
Yes; agreement was reached with assistance of court  
Yes; form of production was ordered by court  
No → go to Q7a  
Don't know → go to Q7a

6b. In what form was ESI to be produced? (check all that apply)

ESI was to produced as paper or hardcopy  
ESI was to produced as TIFF or PDF without corresponding metadata  
ESI was to produced as TIFF or PDF with corresponding metadata  
ESI was to be produced as stored in normal course of business  
ESI was to be produced in searchable form without metadata  
ESI was to be produced in searchable form with metadata  
Other (please describe)  
Don't know

**Discovery of email:**

7a. Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; email that would be subject to discovery was ordered by court

No

Don't know

→ go to Q8a

→ go to Q8a

7b. What email was subject to discovery? (check all that apply)

Email currently on computer system and/or network

Email that has been deleted

Email stored in backup tapes, discs or servers

Legacy data email stored on obsolete systems

Other (please specify)

Don't know

**Preservation of ESI:**

8a. Was preservation of ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; ESI subject to preservation was ordered by court

No

Don't know

→ go to Q9a

→ go to Q9a

8b. What ESI was subject to preservation? (check all that apply)

ESI that is currently on the computer system was required to be preserved.

ESI that would be purged from our computer system under normal business practices was required to be preserved

Other (please specify)

Don't know



**Protection against waiving privilege:**

9a. Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; requirements for claiming privilege for ESI were ordered by court

No

Don't know

9b. Did either your organization or the other party inadvertently produce privileged ESI?

Yes, my organization inadvertently produced privileged ESI

Yes, the other party inadvertently produced privileged ESI

Yes, we both inadvertently produced privileged ESI

No

→ go to Q10

Don't know

→ go to Q10

9c. What was the outcome of inadvertently producing privileged ESI?

Amicably resolved by parties

Parties disagreed but did not pursue disagreement with Court

Court intervened and upheld claim of privilege for ESI

Court intervened and denied claim of privilege for ESI

Other (please explain)

Don't know

10. In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery?

Pre-discovery meeting(s) reduced cost of discovery of ESI substantially

Pre-discovery meeting(s) reduced cost of discovery of ESI moderately

Pre-discovery meeting(s) had no effect on cost of discovery of ESI

Pre-discovery meeting(s) increased cost of discovery of ESI moderately

Pre-discovery meeting(s) increased cost of discovery of ESI substantially

Don't know

**Sanctions:**

11a. Was the issue of "sanctions" for failure to produce discoverable ESI raised by either party in this case?

Yes, we requested that the opposing party be sanctioned

Yes, the opposing party requested that we be sanctioned

Yes, both parties requested sanctioning the other party

No

→ go to Q12a

Don't know

→ go to Q12a

11b. What was the outcome of the request for sanction? (check all that apply)

No sanctions were imposed on either party  
The Court threatened to sanction my organization  
The Court threatened to sanction the opposing party  
The Court sanctioned my organization  
The Court sanctioned the opposing party  
Don't know

12a. Was the issue of "sanctions" for spoliation of ESI raised by either party in this case?

Yes, we requested that the opposing party be sanctioned  
Yes, the opposing party requested that we be sanctioned  
Yes, both parties requested sanctioning the other party  
No → go to Q13a  
Don't know → go to Q13a

12b. What was the outcome of the request for sanction? (check all that apply)

No sanctions were imposed on either party  
The Court threatened to sanction my organization  
The Court threatened to sanction the opposing party  
The Court sanctioned my organization  
The Court sanctioned the opposing party  
Don't know

13a. What was the total amount spent on discovery of any kind in this case?

Write in amount spent on discovery: \$ \_\_\_\_\_

13b. What was the total amount spent on electronic discovery including amount spent on outside counsel and on outside vendors to help with discovery of ESI?

Write in amount spent on electronic discovery: \$ \_\_\_\_\_

13c. What percentage of the amount spent on electronic discovery was spent on privilege review before production of ESI?

Percentage of electronic discovery  
spent on privilege review of ESI: \_\_\_\_\_%

13d. What percentage of the amount spent on electronic discovery was spent on outside vendors to assist in discovery of ESI?

Percentage of electronic discovery  
spent on outside vendors for discovery of ESI: \_\_\_\_\_%

14. What was the resolution of this case?

- Case dismissed
- Case settled
- Case still continuing
- Case went to trial
- Case on appeal
- Other (please explain
- Don't know

**Section III – Opinions regarding Proposed  
Amendments to Federal Rules of Civil Procedure**

As you may know, the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedures recently published proposed amendments to the Federal Rules of Civil Procedure (FRCP) that affect discovery of electronically stored information. The next set of questions summarize the proposed amendments and ask whether you perceive that the issues raised in the proposed amendments needed addressing.

The complete set of proposed amendments is available at:

[www.uscourts.gov/rules/comment2005/CVAug04.pdf](http://www.uscourts.gov/rules/comment2005/CVAug04.pdf)

15. Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery?

- I was familiar with all of the proposed amendments
- I was familiar with some of the proposed amendments
- I knew there were proposed amendments but I was not familiar with any
- I did not know there were proposed amendments
- Other (please explain)

16. Please indicate whether you perceive that the issue raised in the proposed amendments "Definitely Needed Addressing" (Def Add), "Probably Needed Addressing" (Prob Add), "Probably Did Not Need Addressing" (Prob Not Add) or "Definitely Did Not Need Addressing" (Def Not Add) by "clicking" on the appropriate response.

16a. Proposed changes to Rule 16.

At present Rule 16 encompass the pretrial scheduling order issued by the court. The proposed amendments to Rule 16 indicate the scheduling order may also address "provisions for the disclosure or discovery of electronically stored information" (ESI) and "adoption of the parties' agreement for protection against waiving privilege."

Def	Prob	Prob	Def	
Add	Add	Not	Not	Don't
		Add	Add	Know

Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions against waiving privilege in cases involving electronic discovery.

☐ ☐ ☐ ☐ ☐

#### 16b. First set of proposed changes to Rule 26:

At present Rule 26 addresses pretrial "meet and confer" sessions for planning for discovery. The proposed amendments state that pretrial meet and confer sessions include planning for discovery include issues "relating to preserving discoverable information," and "any issues relating to the disclosure or discovery of ESI, including the form in which it should be produced."

Amending the FRCP to alert the parties regarding the potential need to address issues of electronic discovery in meet and confer sessions.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions concerning the preservation of discoverable ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced.

☐ ☐ ☐ ☐ ☐

#### 16c. Second proposed change to Rule 26.

The proposed amendments also are concerned with a party's response to a claim of privilege for ESI that was inadvertently produced. After being notified of a claim of privilege, any party who received the privileged ESI "must promptly return sequester, or destroy the specified information and any copies."

Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it.

☐ ☐ ☐ ☐ ☐

#### 16d. Third proposed change to Rule 26.

The proposed amendment states that, "A party need not provide discovery of ESI that the party identifies as not reasonably accessible." If the opposing party objects, the party must then show why the ESI is not reasonably accessible and the court may order none, some or all of the ESI be produced.

Amending the FRCP to allow parties to claim and perhaps prove ESI is not

reasonably accessible.

☐ ☐ ☐ ☐ ☐

**16e. First Proposed change to Rule 34**

Rule 34 is concerned with the production and inspection of documents in discovery. The proposed amendments extend discovery to “any designated electronically stored information or any designated documents (... in any medium – from which information can be obtained...)”

Amending the FRCP to require the parties to potentially allow discovery of any designated ESI in any medium.

☐ ☐ ☐ ☐ ☐

**16f. Second proposed change to Rule 34.**

A second proposed change to Rule 34 is concerned with the form of production for ESI. The proposed amendment allows the requestor to specify the form in which ESI is to be produced and allows the responder to provide (a) reason(s) for objecting to the request, such as the information is not reasonably accessible in that form. If the parties cannot agree on the form of production and the Court does not order a form of production, as a last resort, the proposed amendment also requires the information must be supplied in the form in which it is ordinarily maintained or in electronically searchable form. The proposed amendment also states, “The party need only produce such information in one form.”

Amending the FRCP to allow the requestor to specify the form in which the ESI is to be produced.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to allow the responder to provide reasons for Objecting to the request for ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to allow responders To only produce ESI in one form.

☐ ☐ ☐ ☐ ☐

**16g. Proposed change to Rule 37.**

Rule 37 is concerned with failure to make disclosures or cooperate in discovery. The proposed amendments would prevent the Court from imposing sanctions “if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable” and information was lost because “of the routine operation of the party’s electronic information system.” As an alternative to the proposed amendment, it has been suggested that the judge be required to make a finding of

intentionality or recklessness before sanctions can be issued for the destruction of otherwise discoverable ESI.

Amending the FRCP to limit sanctions for  
Routine purging of computer systems that  
Results in the destruction of otherwise  
Discoverable ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to limit sanctions for the  
destruction of otherwise discoverable ESI unless  
there is a finding of intentionality or recklessness.

☐ ☐ ☐ ☐ ☐

<p align="center"><b>Section IV – Opinions Regarding the Affects of Electronic Discovery And the Likely Effects of the Proposed Amendments on Your Organization</b></p>
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17. Please indicate whether you “strongly agree,” “agree,” “disagree” or “strongly disagree” with each of the following statements.

The requirements for electronic discovery have  
Led to changes in the policies for electronic  
storage of information at my organization.

SA    A    D    SD    DK

My organization has decreased the number of days it  
Keeps ESI on the computer system to reduce  
the cost of Responding to requests for  
discovery of ESI.

SA    A    D    SD    DK

My organization has developed a cost-effective procedure  
for searching ESI to identify privileged materials.

SA    A    D    SD    DK

The requirements to preserve electronic information  
that normally would be purged from our computer  
system substantially disrupted my organization’s  
routine business operations.

SA    A    D    SD    DK

The requirements to preserve electronic information  
Substantially increased the costs of electronic  
discovery.

SA    A    D    SD    DK

My organization settled the case in which electronic  
discovery was most recently completed to avoid  
the financial costs of electronic discovery.

SA    A    D    SD    DK

18. Please indicate whether each of the following types of ESI is “reasonably accessible.”

Information stored on back-up tapes/discs.

Yes	No	DK
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Information stored on back-up servers.  
 Legacy data stored on obsolete software or hardware.  
 Encrypted information.  
 Information stored on handheld devices used by employees.  
 Information stored on laptops used by employees.  
 Information stored on floppy discs.

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

## Section V: Descriptive information about you and your organization

### Information about your organization:

19a. What type of organization do you work for:

Private corporation  
 Private law firm  
 State Government  
 Federal Government  
 Not-for-profit  
 Other (Please specify) \_\_\_\_\_

→ go to 19c  
 → go to 19c

19b. What is the SIC category for your corporation?

Agriculture, Forestry and Fishing  
 Mining  
 Construction  
 Manufacturing  
 Transportation, Communication, Electric, Gas and Sanitary Services  
 Wholesale trade  
 Retail Trade  
 Finance, Insurance and Real Estate  
 Business Services  
 Professional Services  
 Public Administration

19c. What was the approximate total annual revenue of your organization for 2004?

Less than \$1,000,000  
 \$1,000,000 but less than \$10,000,000  
 \$10,000,000 but less than \$50,000,000  
 \$50,000,000 but less than \$100,000,000  
 \$100,000,000 but less than \$500,000,000  
 \$500,000,000 but less than \$1,000,000,000  
 \$1,000,000,000 but less than \$10,000,000,000  
 \$10,000,000,000 or more

19d. Approximately, how many full-time in-house lawyers does your organization employ?

- 1
- 2-5
- 6-10
- 11-20
- 21-50
- 51 or more
- Don't know

**Information about you:**

20a. How many years has it been since you graduated from law school?

- 1
- 2-5
- 6-10
- 11-20
- 21-30
- 31 or more

20b. What is your current position at your organization?

- Head lawyer at organization
- Senior lawyer supervising other attorneys
- Staff lawyer
- Other (specify)

20c. What is your gender?

- Female
- Male

Thank you for completing this survey.

Please click on the button below to submit.



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04-CV-090  
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VIA FACSIMILE

January 31, 2005

Peter G. McCabe, Secretary  
Committee on Rules of Practice and Procedure  
of the Judicial Conference of the United States  
Thurgood Marshall Federal Judiciary Building  
Washington D.C. 20544

Re: *Testimony on February 11, 2005*

Dear Mr. McCabe:

Thank you for your letter of January 24. We look forward to seeing you in Washington on February 11.

Your letter asked for our written statement by January 31. You already have the "hard copy" questions of our electronic survey on the issues underlying the proposed amendments – the answers to which we are currently tabulating. The copy of the survey was previously sent to you, as an attachment to our Request to Testify.

And as you know from our earlier letter our statement will, in essence, consist of transmission of the results of our survey.

We are still in the process of analyzing the data, and will be busy with that job for the next week or so, as well as with writing the Report of Results, all so that we can be fully prepared by February 11.

Our statement on February 11 will consist of the following:

1. Summary of the Major Findings of Survey, with written materials
2. Explanation of Survey Methodology
3. Response to Questions About Survey Methodology

2004-2005

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We therefore sincerely hope the Committee will grant us additional time to get you the written aspect of our testimony, styled "Report on the Digital Evidence Project Survey on Electronically Stored Information," and that this will not overly inconvenience the Panel.

If this does present a problem, we respectfully request a chance to discuss the issue.

Finally, it is an honor to be allowed to testify and we look forward to seeing you in person.

Sincerely,

George Paul  
Digital Evidence Project

GLP/edl

2004-2005

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04252 Digital Evidence Survey  
January 14, 2005

To: (Respondent's name or email)  
From: ABA Section on Science and Technology Law  
Subject: ABA Survey of Digital Evidence/Changes to Federal Rules of Civil Procedure

I am writing to invite you to participate in an important survey on proposed amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information. The Information Security Committee of the American Bar Association's Section of Science & Technology Law is conducting the survey as part of its Digital Evidence Project.

You have been randomly selected from a list of in-house corporate and other counsel around the country. Given the need for a strong response rate, your response to this survey is critical.

The proposed amendments could have a significant impact on the discovery of electronically stored information and could thus have a direct effect on your organization. The survey gathers information about your current practices for electronically stored information and your views regarding the proposed amendments.

Target Research Group (TRG), a national survey research firm, has been commissioned to conduct the survey and to compile the results. All respondents are guaranteed anonymity, and your responses will be used only in the aggregate.

Please take the survey by clicking on the link below. For those familiar with electronic discovery issues, we estimate that the survey will take approximately 10-15 minutes to complete.

Insert link here

Public comments on the proposed amendments must be filed by February 15, 2005; therefore, **we need your response by January 28, 2005**. If we are able to obtain appropriate authorization from the ABA, we intend to make the results of this survey available to the Judicial Conference of the United States, the Standing Committee on Rules of Practice and Procedure, and the Advisory Committee on Federal Rules of Civil Procedure for their consideration in drafting the new Federal Rules of Civil Procedure.

If you have any questions about the survey, please contact:

1. George Paul, Chair, Digital Evidence Project, gpaul@lrlaw.com, 602-262-5326;
2. Mike Prounis, Digital Evidence Project, michael.prounis@evidenceexchange.com, 212-594-2501; or
3. Mike Faraci, Digital Evidence Project, mfaraci@NavigantConsulting.com, 202-973-2431

This is an excellent opportunity for you to provide input on the proposed amendments to the FRCP, amendments that will affect discovery

of digital evidence in the coming years. As you know, the reliability of a survey depends on the response rate, and every response contributes to its success. Thank you in advance for your assistance.

Sincerely,

Ivan K. Fong  
Chair, 2004-05  
ABA Section of Science & Technology Law

## Digital Evidence Questionnaire

### Section I - Screening questions

The purpose of these questions is to determine your organization's experience with discovery of electronically stored information.

1. Has your organization been either a defendant or plaintiff in at least one lawsuit that was filed after January 1, 2000?

- Yes → continue
- No → Go to Section V
- Don't know → Go to section V

#### Definition

For purposes of this survey:

**Electronic discovery** refers to the discovery of electronically stored information (ESI) including email, word processing documents, spreadsheets, voice mail, and virtually anything that is stored in electronic form on networks, servers, personal computers, floppy discs, hard drives, back-up tapes and other devices.

**ESI** is used as an acronym for "electronically stored information"

#### Organization as Plaintiff:

2a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a plaintiff in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as plaintiff, discovery occurred:

- 0 → go to Q. 3a
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: \_\_\_\_\_
- Don't know ☐

2b. How many of those lawsuits in which your organization was a plaintiff included electronic discovery?

- 0
- 1-3
- 4-6
- 7-10
- If more than 10, enter approximate number: \_\_\_\_\_
- Don't know ☐

**Organization as defendant:**

3a. Since January 1, 2000, including closed as well as open cases, in approximately how many lawsuits has your organization been a defendant in which discovery of any kind occurred?

Number of lawsuits since January 1, 2000 as defendant, discovery occurred:

0 → go to box before Q4

1-3

4-6

7-10

If more than 10, enter approximate number: \_\_\_\_\_

Don't know ☐

3b. How many of those lawsuits in which your organization was a defendant included electronic discovery?

0

1-3

4-6

7-10

If more than 10, enter approximate number: \_\_\_\_\_

Don't know ☐

If "0" to 2a and "0" to 3a go to Section V  
If "0" to 2a and "0" to 3b go to Section V  
If "0" to 2b and "0" to 3a go to Section V  
If "0" to 2b and "0" to 3b go to Section V  
If DK to 2a and 2b and 3a and 3b terminate

**Section II – Experience with electronic discovery in most recent case**

The next series of questions should be answered regarding the most recent experience your organization has had in which electronic discovery occurred.

**Definitions of terms used in this section**

**"Metadata"** is information about a particular data set which describes how, when and by whom it was collected, created, accessed, modified and how it is formatted. Usually, metadata is not visible on the screen but is automatically appended to the file.

**"Legacy data"** is information is that the organization has stored on software or hardware that has been rendered obsolete or outmoded.

4. Was your organization the plaintiff, the defendant or both defendant and counter claimant in the case in which electronic discovery was most recently completed?

Plaintiff  
Defendant  
Both defendant and counter claimant  
Other (please explain)

5a. Did your side have (a) pre-discovery meeting or meetings with opposing counsel for the purpose of developing the parameters for electronic discovery?

Yes → continue  
No → go to Q6  
Don't know → go to Q6

5b. What was the final result of the pre-discovery meeting(s) regarding electronic discovery?

The parties agreed on the issues regarding electronic discovery without assistance of Court	→ Continue
The parties agreed on the issues regarding electronic discovery with assistance of Court	→ Continue
The parties did not agree on the issues regarding electronic discovery and the Court mandated the terms for electronic discovery.	→ Continue
Other (please explain)	→ Continue
Don't know	→ Continue

**Form of production:**

6a. Was the form in which ESI was to be produced discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court  
Yes; agreement was reached with assistance of court  
Yes; form of production was ordered by court  
No → go to Q7a  
Don't know → go to Q7a

6b. In what form was ESI to be produced? (check all that apply)

ESI was to produced as paper or hardcopy  
ESI was to produced as TIFF or PDF without corresponding metadata  
ESI was to produced as TIFF or PDF with corresponding metadata  
ESI was to be produced as stored in normal course of business  
ESI was to be produced in searchable form without metadata  
ESI was to be produced in searchable form with metadata  
Other (please describe)  
Don't know

**Discovery of email:**

7a. Was the email that would be subject to discovery discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; email that would be subject to discovery was ordered by court

No

Don't know

→ go to Q8a

→ go to Q8a

7b. What email was subject to discovery? (check all that apply)

Email currently on computer system and/or network

Email that has been deleted

Email stored in backup tapes, discs or servers

Legacy data email stored on obsolete systems

Other (please specify)

Don't know

**Preservation of ESI:**

8a. Was preservation of ESI discussed in the pre-discovery meeting(s)?

Yes; agreement was reached without assistance of court

Yes; agreement was reached with assistance of court

Yes; ESI subject to preservation was ordered by court

No

Don't know

→ go to Q9a

→ go to Q9a

8b. What ESI was subject to preservation? (check all that apply)

ESI that is currently on the computer system was required to be preserved.

ESI that would be purged from our computer system under normal business practices was required to be preserved

Other (please specify)

Don't know



**Protection against waiving privilege:**

9a. Was protection against inadvertently producing privileged ESI discussed in the pre-discovery meeting(s)?

- Yes; agreement was reached without assistance of court
- Yes; agreement was reached with assistance of court
- Yes; requirements for claiming privilege for ESI were ordered by court
- No
- Don't know

9b. Did either your organization or the other party inadvertently produce privileged ESI?

- Yes, my organization inadvertently produced privileged ESI
- Yes, the other party inadvertently produced privileged ESI
- Yes, we both inadvertently produced privileged ESI
- No → go to Q10
- Don't know → go to Q10

9c. What was the outcome of inadvertently producing privileged ESI?

- Amicably resolved by parties
- Parties disagreed but did not pursue disagreement with Court
- Court intervened and upheld claim of privilege for ESI
- Court intervened and denied claim of privilege for ESI
- Other (please explain)
- Don't know

10. In your opinion how useful were the pre-discovery meetings for reducing the costs to your organization of electronic discovery?

- Pre-discovery meeting(s) reduced cost of discovery of ESI substantially
- Pre-discovery meeting(s) reduced cost of discovery of ESI moderately
- Pre-discovery meeting(s) had no effect on cost of discovery of ESI
- Pre-discovery meeting(s) increased cost of discovery of ESI moderately
- Pre-discovery meeting(s) increased cost of discovery of ESI substantially
- Don't know

**Sanctions:**

11a. Was the issue of "sanctions" for failure to produce discoverable ESI raised by either party in this case?

- Yes, we requested that the opposing party be sanctioned
- Yes, the opposing party requested that we be sanctioned
- Yes, both parties requested sanctioning the other party
- No → go to Q12a
- Don't know → go to Q12a

11b. What was the outcome of the request for sanction? (check all that apply)

No sanctions were imposed on either party  
The Court threatened to sanction my organization  
The Court threatened to sanction the opposing party  
The Court sanctioned my organization  
The Court sanctioned the opposing party  
Don't know

12a. Was the issue of "sanctions" for spoliation of ESI raised by either party in this case?

Yes, we requested that the opposing party be sanctioned  
Yes, the opposing party requested that we be sanctioned  
Yes, both parties requested sanctioning the other party  
No → go to Q13a  
Don't know → go to Q13a

12b. What was the outcome of the request for sanction? (check all that apply)

No sanctions were imposed on either party  
The Court threatened to sanction my organization  
The Court threatened to sanction the opposing party  
The Court sanctioned my organization  
The Court sanctioned the opposing party  
Don't know

13a. What was the total amount spent on discovery of any kind in this case?

Write in amount spent on discovery: \$\_\_\_\_\_

13b. What was the total amount spent on electronic discovery including amount spent on outside counsel and on outside vendors to help with discovery of ESI?

Write in amount spent on electronic discovery: \$\_\_\_\_\_

13c. What percentage of the amount spent on electronic discovery was spent on privilege review before production of ESI?

Percentage of electronic discovery  
spent on privilege review of ESI: \_\_\_\_\_%

13d. What percentage of the amount spent on electronic discovery was spent on outside vendors to assist in discovery of ESI?

Percentage of electronic discovery  
spent on outside vendors for discovery of ESI: \_\_\_\_\_%

14. What was the resolution of this case?

- Case dismissed
- Case settled
- Case still continuing
- Case went to trial
- Case on appeal
- Other (please explain)
- Don't know

**Section III – Opinions regarding Proposed  
Amendments to Federal Rules of Civil Procedure**

As you may know, the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedures recently published proposed amendments to the Federal Rules of Civil Procedure (FRCP) that affect discovery of electronically stored information. The next set of questions summarize the proposed amendments and ask whether you perceive that the issues raised in the proposed amendments needed addressing.

The complete set of proposed amendments is available at:

[www.uscourts.gov/rules/comment2005/CVAug04.pdf](http://www.uscourts.gov/rules/comment2005/CVAug04.pdf)

15. Before receiving the solicitation letter and links for this survey how familiar were you with the proposed amendments to the FRCP that are concerned with electronic discovery?

- I was familiar with all of the proposed amendments
- I was familiar with some of the proposed amendments
- I knew there were proposed amendments but I was not familiar with any
- I did not know there were proposed amendments
- Other (please explain)

16. Please indicate whether you perceive that the issue raised in the proposed amendments "Definitely Needed Addressing" (Def Add), "Probably Needed Addressing" (Prob Add), "Probably Did Not Need Addressing" (Prob Not Add) or "Definitely Did Not Need Addressing" (Def Not Add) by "clicking" on the appropriate response.

16a. Proposed changes to Rule 16.

At present Rule 16 encompass the pretrial scheduling order issued by the court. The proposed amendments to Rule 16 indicate the scheduling order may also address "provisions for the disclosure or discovery of electronically stored information" (ESI) and "adoption of the parties' agreement for protection against waiving privilege."

		Prob	Def	
Def	Prob	Not	Not	Don't
Add	Add	Add	Add	Know

Amending the FRCP to alert the parties regarding the potential need to adopt "provisions for the disclosure or discovery of ESI"

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions against waiving privilege in cases involving electronic discovery.

☐ ☐ ☐ ☐ ☐

16b. First set of proposed changes to Rule 26:

At present Rule 26 addresses pretrial "meet and confer" sessions for planning for discovery. The proposed amendments state that pretrial meet and confer sessions include planning for discovery include issues "relating to preserving discoverable information," and "any issues relating to the disclosure or discovery of ESI, including the form in which it should be produced."

Amending the FRCP to alert the parties regarding the potential need to address issues of electronic discovery in meet and confer sessions.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions concerning the preservation of discoverable ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to alert the parties regarding the potential need to adopt provisions regarding the form in which ESI should be produced.

☐ ☐ ☐ ☐ ☐

16c. Second proposed change to Rule 26.

The proposed amendments also are concerned with a party's response to a claim of privilege for ESI that was inadvertently produced. After being notified of a claim of privilege, any party who received the privileged ESI "must promptly return sequester, or destroy the specified information and any copies."

Amending the FRCP to alert the parties regarding the potential need to require that inadvertently produced privileged ESI be sequestered, returned or destroyed by any party receiving it.

☐ ☐ ☐ ☐ ☐

16d. Third proposed change to Rule 26.

The proposed amendment states that, "A party need not provide discovery of ESI that the party identifies as not reasonably accessible." If the opposing party objects, the party must then show why the ESI is not reasonably accessible and the court may order none, some or all of the ESI be produced.

Amending the FRCP to allow parties to claim and perhaps prove ESI is not

reasonably accessible.

☐ ☐ ☐ ☐ ☐

16e. First Proposed change to Rule 34

Rule 34 is concerned with the production and inspection of documents in discovery. The proposed amendments extend discovery to "any designated electronically stored information or any designated documents (... in any medium – from which information can be obtained...)."

Amending the FRCP to require the parties to potentially allow discovery of any designated ESI in any medium.

☐ ☐ ☐ ☐ ☐

16f. Second proposed change to Rule 34.

A second proposed change to Rule 34 is concerned with the form of production for ESI. The proposed amendment allows the requestor to specify the form in which ESI is to be produced and allows the responder to provide (a) reason(s) for objecting to the request, such as the information is not reasonably accessible in that form. If the parties cannot agree on the form of production and the Court does not order a form of production, as a last resort, the proposed amendment also requires the information must be supplied in the form in which it is ordinarily maintained or in electronically searchable form. The proposed amendment also states, "The party need only produce such information in one form."

Amending the FRCP to allow the requestor to specify the form in which the ESI is to be produced.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to allow the responder to provide reasons for Objecting to the request for ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to require ESI to be produced in the form ordinarily kept or in electronically searchable form when the parties cannot agree and the Court issues no order.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to allow responders To only produce ESI in one form.

☐ ☐ ☐ ☐ ☐

16g. Proposed change to Rule 37.

Rule 37 is concerned with failure to make disclosures or cooperate in discovery. The proposed amendments would prevent the Court from imposing sanctions "if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable" and information was lost because "of the routine operation of the party's electronic information system." As an alternative to the proposed amendment, it has been suggested that the judge be required to make a finding of

intentionality or recklessness before sanctions can be issued for the destruction of otherwise discoverable ESI.

Amending the FRCP to limit sanctions for  
Routine purging of computer systems that  
Results in the destruction of otherwise  
Discoverable ESI.

☐ ☐ ☐ ☐ ☐

Amending the FRCP to limit sanctions for the  
destruction of otherwise discoverable ESI unless  
there is a finding of intentionality or recklessness.

☐ ☐ ☐ ☐ ☐

**Section IV – Opinions Regarding the Affects of Electronic Discovery  
And the Likely Effects of the Proposed Amendments on Your Organization**

17. Please indicate whether you "strongly agree," "agree," "disagree" or "strongly disagree" with each of the following statements.

The requirements for electronic discovery have  
Led to changes in the policies for electronic  
storage of information at my organization.

SA    A    D    SD    DK

My organization has decreased the number of days it  
Keeps ESI on the computer system to reduce  
the cost of Responding to requests for  
discovery of ESI.

SA    A    D    SD    DK

My organization has developed a cost-effective procedure  
for searching ESI to identify privileged materials.

SA    A    D    SD    DK

The requirements to preserve electronic information  
that normally would be purged from our computer  
system substantially disrupted my organization's  
routine business operations.

SA    A    D    SD    DK

The requirements to preserve electronic information  
Substantially increased the costs of electronic  
discovery.

SA    A    D    SD    DK

My organization settled the case in which electronic  
discovery was most recently completed to avoid  
the financial costs of electronic discovery.

SA    A    D    SD    DK

18. Please indicate whether each of the following types of ESI is "reasonably accessible:"

Information stored on back-up tapes/discs.

Yes    No    DK  
☐    ☐    ☐

Information stored on back-up servers.  
 Legacy data stored on obsolete software or hardware.  
 Encrypted information.  
 Information stored on handheld devices used by employees.  
 Information stored on laptops used by employees.  
 Information stored on floppy discs.

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

<p><b>Section V: Descriptive information about you and your organization</b></p>
--

**Information about your organization:**

19a. What type of organization do you work for:

Private corporation  
 Private law firm  
 State Government  
 Federal Government  
 Not-for-profit  
 Other (Please specify) \_\_\_\_\_ → go to 19c  
 → go to 19c

19b. What is the SIC category for your corporation?

Agriculture, Forestry and Fishing  
 Mining  
 Construction  
 Manufacturing  
 Transportation, Communication, Electric, Gas and Sanitary Services  
 Wholesale trade  
 Retail Trade  
 Finance, Insurance and Real Estate  
 Business Services  
 Professional Services  
 Public Administration

19c. What was the approximate total annual revenue of your organization for 2004?

Less than \$1,000,000  
 \$1,000,000 but less than \$10,000,000  
 \$10,000,000 but less than \$50,000,000  
 \$50,000,000 but less than \$100,000,000  
 \$100,000,000 but less than \$500,000,000  
 \$500,000,000 but less than \$1,000,000,000  
 \$1,000,000,000 but less than \$10,000,000,000  
 \$10,000,000,000 or more

19d. Approximately, how many full-time in-house lawyers does your organization employ?

- 1
- 2-5
- 6-10
- 11-20
- 21-50
- 51 or more
- Don't know

**Information about you:**

20a. How many years has it been since you graduated from law school?

- 1
- 2-5
- 6-10
- 11-20
- 21-30
- 31 or more

20b. What is your current position at your organization?

- Head lawyer at organization
- Senior lawyer supervising other attorneys
- Staff lawyer
- Other (specify)

20c. What is your gender?

- Female
- Male

Thank you for completing this survey.

Please click on the button below to submit.